



Mbugua & another (Suing as legal representatives of the Estate of Lawrence Githua Mbugua (Deceased)) v Kariuki & 12 others (Environment & Land Case 104 of 2013) [2024] KEELC 261 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 261 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 104 OF 2013
OA ANGOTE, J
JANUARY 25, 2024**

BETWEEN

**ELIZABETH WANJIKU MBUGUA 1ST PLAINTIFF
SAMUEL MBUGUA GITHUA 2ND PLAINTIFF
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF LAWRENCE
GITHUA MBUGUA (DECEASED)**

AND

**STEPHEN GITAU KARIUKI 1ST DEFENDANT
FRANCIS NDUNGU KINYANJUI 2ND DEFENDANT
FRANCIS NJOGU GITAU 3RD DEFENDANT
PAUL NGUGI KAMAU 4TH DEFENDANT
DAVID KAMAU NGUGI 5TH DEFENDANT
JOSEPH NJENGA 6TH DEFENDANT
PELAGIA KANYI KOIMBURI 7TH DEFENDANT
MARIA WATETU 8TH DEFENDANT
ESTHER WANGUI NDUNG’U 9TH DEFENDANT
MARY WAMUHU KAMAU 10TH DEFENDANT
LILIAN WAIRIMU KAMAU 11TH DEFENDANT
REGISTRAR OF LANDS 12TH DEFENDANT
ATTORNEY GENERAL 13TH DEFENDANT**



JUDGMENT

1. In the Amended Complaint dated 31st March 2022, the Plaintiffs have sought for the following reliefs:
 - a. A declaration that the Plaintiff (deceased) is the lawful registered proprietor of land known as Muguga/Muguga/T.69
 - b. An order to issue to forcefully evict the 1st to 11th defendants, their agents, servants and/or representative from Muguga/Muguga/T.69.
 - c. The Officer Commanding Kikuyu Police Station to provide security and supervise the eviction of the 1st to 11th Defendants.
 - d. A permanent injunction to issue restraining the 1st to 11th Defendants from occupying, construction thereon, demarcating, subdividing, fencing, telling out, licensing, leasing, charging and/or in any other way prejudicially dealing with Muguga/Muguga/T.69.
 - e. Costs of the suit and interest.
2. The Plaintiffs averred in the Complaint that the deceased, Lawrence Githua Mbugua is the registered proprietor of land known as Muguga/Muguga/T.69 which is situated within Muguga Location, Kiambu County, the suit land (the suit property) and that the deceased purchased the suit land in 1982, and the Attorney General thereafter registered the deceased's proprietary rights to the land as provided under the Registration of *Land Act*.
3. The Plaintiffs averred that in December 2012, the deceased, on a normal inspection of the land, discovered that the 1st to 11th Defendants had trespassed and illegally occupied the suit land and that the deceased directed the trespassers to immediately vacate the suit land but they disregarded his directions and continue to unlawfully occupy the suit land.
4. The 1st, 2nd, 3rd, 4th, 5th, 10th and 11th Defendants denied that the deceased was the absolute proprietor of the suit property and denied that they were trespassers. They averred that the land was community land held by the native land trust board on their behalf and that the suit property was fraudulently transferred to the deceased in breach of the community's rights.
5. Without prejudice to the foregoing, the Defendants averred that if the Plaintiff acquired the land in 1982, then they have acquired title to the land by way of adverse possession, as they have stayed on the land since 1982 to date.
6. In the counterclaim, the Defendants are claiming for breach of their community rights and seeks for a cancellation of the Plaintiffs' title and reversion of title to the Native Lands Board on grounds of fraud. They thereby seek the following orders:
 - a. That a declaration do issue that the parcel MUGUGA/MUGUGA/T.69 is trust land which was illegally and fraudulently transferred to the Plaintiff from the Native Trust Board and that the Plaintiff holds the same illegally and fraudulently and orders do issue that the Plaintiff's registration on 24th June 1982 as entry No. 3 be cancelled and the title to revert to Native Land Trust Board.
 - b. That costs do issue.



7. The 12th and 13th Defendants averred that the Plaintiff raises no cause of action against them and that the Plaintiff's claim, if any, lies with the 1st to 10th Defendants.

Hearing and Evidence

8. PW1, Elizabeth Wanjiku Mbugua, relied on her written statement dated 31st March 2022 as her evidence in chief. In her statement, PW1 averred that she is a co-administrator of the deceased's estate and is the deceased's widow.
9. It was the evidence of PW1 that the late Plaintiff is the registered owner of the suit property, which he bought in 1982 from Karanja Thuku for consideration of Kshs. 33,000; that the deceased offered the title as security for a loan sought by Lois Njoki Wambugi and that in December 2012, when on a normal inspection of the land, the deceased discovered that some people had encroached on the suit property.
10. In cross-examination, PW1 testified that they live in Kabete and have never lived in Muguga; that apart from the title deed, she did not have any other documents; that she was not aware of when the Defendants entered the suit property; that they all had a sitting with the chief and the Defendants were told to vacate the land and that she did not know that the owner of the land was a headman. The Plaintiff produced the title deed and green card as PEXB2 and PEXB3.
11. DW1, Paul Ngugi Kamau, relied on his statement dated 18th June 2019 as his evidence in chief. He averred that he knows the other Defendants as they, together with more than 30 families occupy the plot, and only have enough spaces for houses. He attached his house photo and reiterated that the Plaintiff is a land grabber.
12. DW1 stated that the Plaintiff fraudulently acquired title as the land was government land and that they have never been summoned by the Native Trust Board, Kikuyu Town Council, or the Land Registrar or Land Board to approve the sale.
13. DW1 testified that after colonial villages were abandoned, his grandparents and parents remained on the land; that they entered the land in 1959 and have remained on the land to date; that the land belonged to the government and the Green Card shows that the land belonged to the Native Land Trust Board and that they did not have a title to the land.
14. DW1 averred that they first met the deceased Plaintiff in 2013 when he came to the land with his wife, PW1; that they went to the chief but they never agreed and that the issue was escalated to the District Officer, who was brought to the suit property by the Chief.
15. In cross-examination, DW1 testified that he was born on the land and that the 1st, 2nd, 3rd, 8th and 10th Defendants were members of his extended family; that he did not have any documents to show when they entered the land; that the search shows that this was a free zone and that he had no document that showed that the land was designated as a colonial village.
16. DW1 stated that the suit property was part of a larger village and in the neighbourhood, people have titles except those that live in the area where the suit land is located; that the land was issued to Karanja Thuku (deceased) who was a land official, who then transferred the land to the deceased Plaintiff and that the Defendants were not aware of the title until 2013.

Submissions

17. Counsel for the Plaintiff submitted that the deceased was the lawful registered proprietor of the suit property. Counsel relied on the case of Adriano Wesaya vs Julius Nakaya Kabole [2020] eKLR where



- the court stated that the Certificate of Title should be taken by the court as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the land.
18. With respect to the Defendants' claim of fraud, the Plaintiff's Counsel submitted that the Defendants have not produced any evidence to support their claims of alleged fraud and that the deceased had no part in the transfer of the suit property from the Native Land Trust Board and is a stranger to the allegations of fraud made against him.
 19. Counsel relied on the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR where the court held that fraud must be specifically pleaded and that the particulars of fraud must be stated in the pleading. They also relied on Central Bank of Kenya Limited vs Trust Bank Limited & 4 Others [1996] eKLR where the court underscored that the burden of proof in claims of fraud is beyond that of a balance of probabilities.
 20. It was the Plaintiffs' Counsel's submission that the Native Land Trust Board ceased to be operational and cannot hold title to the land; that the function of the Native Land Trust Board was transferred to the Trust Land Board pursuant to Sections 4 and 9 of the Kenya Land Order in Council (1960) and that no evidence was tendered by the Defendants proving the alleged transfer from the Native Land Trust Board to Karanja Thuku.
 21. Counsel submitted that the Defendants were not in occupation of the suit property prior to the demarcation; that had they been in possession of the land, they would have been registered as proprietors by the County Council of Kiambu; that the Defendants did not tender any evidence of their occupation and that DW1 admitted that there was no photographic evidence of their occupation since 1950 as alleged.
 22. It was Counsel's submission that the transfer of the suit property from Native Trust Board to Karanja Thuku, who in turn sold it to the deceased was not fraudulent and that there was no collusion as alleged by the Defendants.
 23. Counsel for the 1st, 2nd, 3rd, 4th, 5th, 10th and 11th Defendants (the Defendants) submitted that the title originated from the Native Land Trust Board, and that there was no evidence of how the Government transferred it to Karanja Thuku, who purportedly sold it to the late Plaintiff. The Defendants' Counsel submitted that the Plaintiff did not file a Defence to their counterclaim.
 24. Counsel submitted that the issue before this court is whether the Plaintiffs discharged the burden of proof. Counsel relied on the case of Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR where the court held that for a title to be upheld, it must conform to procedure. Counsel additionally submitted that as the suit property is Government land, there should have been application forms given to the buyer.
 25. Counsel for the 12th and 13th Defendants submitted that there was no intention by the Registrar of Lands to defraud any party herein and that no evidence of fraud by the 12th Defendant has been availed before this court. Counsel relied on the case of Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another (2013) eKLR and Ashit Patani & 2 Others vs Dhirajlal vs Patani & 2 Others [2017] eKLR and the definition of fraud as set out in the Black's Law Dictionary 7th edition.
 26. Counsel for the Attorney General submitted that while the Plaintiffs' title was obtained from the County Council of Kiambu, the Plaintiffs failed to enjoin the County Government of Kiambu to clarify if indeed they allocated the suit land to Karanja Thuku.



27. It was the Attorney General's submission that the Defendants have not produced any evidence to prove that the land held by the Native Trust board was fraudulently transferred to the Plaintiffs and that the Defendants have not demonstrated that the suit land is community land.
28. It was submitted that Article 63(3) of *the Constitution* provides that unregistered community land shall be held by the County Government on behalf of communities for which it is held and that no evidence has been produced to show that the suit property was held by the County Government on behalf of the Defendants' community.

Analysis and Determination

29. This court has considered the pleadings, submissions and evidence presented by the parties. The issues for determination are as follows:
 - a. Whether the Plaintiff is the legally registered proprietor of the suit property.
 - b. Whether the Defendants have trespassed on the suit property.
30. The primary dispute in this matter is the ownership of the suit property, MUGUGA/MUGUGA/T.69 which is situated within Muguga Location, Kiambu County. The Plaintiffs, who represent the Estate of the deceased, Lawrence Githua Mbugua, have averred that the Deceased lawfully purchased the suit property in 1982 and obtained legal and absolute title to the same.
31. The Defendants, however assert that the title held by the Plaintiffs was acquired fraudulently as the land was unlawfully sold by the Native Land Trust Board to Karanja Thuku, who thereafter sold the land to the deceased. In the alternative, the Defendants claim that they have acquired title to the suit property through adverse possession having lived on the suit property since 1959.
32. It is trite that a certificate of title is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. However, a certificate of title can be challenged on grounds that it was obtained through fraud, misrepresentation, corruption, illegally or unprocedurally. Section 26 of the *Land Registration Act* sets out the principle of indefeasibility of title as follows:
 - “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
33. Courts have held that when a certificate of title is challenged, the proprietor needs to prove that he acquired the title legally. In the Court of Appeal case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR, the court stated that:

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the



instrument and prove the legality of how he acquired the title and show that the acquisition was legal...”

34. In this case, the Defendants have challenged the Plaintiffs’ title on grounds on fraud. It is well established that where fraud is alleged, the party who claims fraud must specifically plead fraud and state the particulars of such fraud, and prove the same.
35. The Court of Appeal in *Demutila Nanyama Pururmu vs Salim Mohamed Salim* [2021] eKLR quoted with approval the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
36. As regards the standard of proof for fraud, the Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
37. The particulars of fraud alleged by the Defendants are collusion between the Land Registrar Kiambu and the Surveyor to transfer the land held by the Native Trust Board to the deceased Plaintiff, and concealing material facts regarding the history of the land.
38. The Defendants produced photographs of their homes on the suit property as well as a copy of the green card with respect to the suit property. In support of their claim of ownership, the Plaintiffs’ witness, PW1, produced the title deed in the Plaintiffs’ favour and a copy of the green card as evidence.
39. The green cards presented by each of the parties are not identical. However, they both shows that on 23rd November 1959, the suit land was registered in favour of the Native Land Trust Board; on 14th April 1982, the property was transferred to Karanja Thuku and on 24th June 1982, the property was transferred to Lawrence Githua Mbugua, the deceased Plaintiff. That is where the similarities end.
40. On the Plaintiffs’ green card, it is indicated that the property was transferred to the County Council of Kiambu, which is not indicated in the Defendants’ green card. On the other hand, the Defendants’ green card shows under the section titled ‘easements,’ that the suit property is ‘reserved for spare plot’, and that a land certificate was issued to the Plaintiff on 24th June 1982. These details are not on the Plaintiffs’ green card.
41. This court cannot determine which of the two green cards is valid. All the same, it is not disputed that the suit property was initially held by the Native Lands Trust Board in 1959.



42. This Court is guided by the provisions of *the Constitution* of Kenya (repealed), which under Section 114 (1)(b) stipulated that land that land reserved for natives as at 31st May 1963 was considered trust land, which vested in the county council within which the area of land was situated.
43. Section 115 of the Repealed Constitution provided that trust land was to be held on behalf of the persons' resident on the said land and it was to give effect to the rights, interests and benefits of all in accordance with African customary rights. Section 116 of the Repealed Constitution thereafter provided for registration of individual titles to Trust Land as follows:

“ 116.

- (1) A county council may, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust land.
- (2) The laws to which subsection (1) applies are -
 - (a) the *Land Consolidation Act* and the *Land Adjudication Act*; and
 - (b) any other law permitting the registration of individual titles to estates, interests or rights in or over land that, immediately before registration, is Trust land (except so far as the law permits the registration of estates, interests or rights vested in persons or authorities for whose use and occupation the land has been set apart under this Chapter).”

44. The Supreme Court in *Isack M'inanga Kiebia vs Isaaya Theuri M'lintari & another* [2018] eKLR considered the role of county councils in giving effect to rights and interests under African Customary Law under Section 116 of the Repealed Constitution. It authoritatively stated that this obligation did not cease upon the application of the *Land Consolidation Act* and the *Land Adjudication Act* to that land. Rather, that the duty to give effect to these rights, became more pronounced, during the land registration process:

“(39) It is instructive to note that neither Section 115 nor 116 of the retired Constitution stipulates that upon registration of Trust land, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished. All that the Section provides is that “no right, interest or other benefit under African customary law shall have effect for the purposes of the relevant sub Section (115 (2)) so far as it is repugnant to any written law”. On the contrary, *the Constitution* is categorical that each county council shall give effect to such rights, interests or other benefits in respect of the land as may, under African customary law for the time being in force or applicable thereto, be vested in any tribe, group, family or individual.



- (40) There can be no doubt that the obligation imposed upon a county council to give effect to rights under African customary law applicable to Trust land did not cease upon the application of the *Land Consolidation Act* and the *Land Adjudication Act* to that land. In fact, the duty to give effect to these rights, became more pronounced, during the land registration process. Given the fluidity and complexity of these rights, it is obvious that, such rights could not find expression in the Register in their totality. Such customary rights as could not be noted on the register would have to be recognized somehow, for they had already been recognized by *the Constitution*.”
45. In this case, no evidence has been presented to show that the suit property underwent any process of adjudication before it was adjudicated in favor of Karanja Thuku, and thereafter title issued to him.
46. In the absence of documentation proving that Mr. Thuku legitimately purchased the suit property from the Kiambu County Council, this court must find that Karanja Thuku’s title was acquired unprocedurally. On this basis, it cannot be said that the Plaintiff acquired a better title to the suit land.
47. Even if the deceased Plaintiff was indeed an innocent purchaser without notice of defect, courts have held that under Section 26(1)(b) of the *Land Registration Act*, an innocent purchaser’s title is impeachable so long as it was obtained illegally. This was so held in *Elijah Makeri Nyangw’ra vs Stephen Mungai Njuguna & Another* [2013] eKLR as follows:
- “Is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”
48. The upshot of the foregoing is that the Plaintiff’s title was null and void ab initio. The consequence of this finding is that the suit property remains trust land, held on behalf of its residents by the County Government of Kiambu, which succeeded the Kiambu County Council.
49. Further, upon the enactment of the *Community Land Act*, 2016, which repealed the Trust Lands Act, the suit property becomes unregistered community land. This is in accordance with Section 10(3) of the *Community Land Act* which prescribes as follows:
- “...until any parcel of community land has been registered in accordance with this Act, such land shall remain unregistered community land and shall, subject to this Act, be held in trust by the county governments on behalf of the communities for which it is held pursuant to Article 63(3) of *the Constitution*.”
50. Considering that the Plaintiff does not hold a valid title to the suit property, the Defendants and all other persons resident on the suit property cannot be said to have committed the tort of trespass.
51. In any event, the evidence before the court shows that the Defendants have always been in occupation of the suit land.



52. Although the deceased purchased the land in 1982, he never took possession of the same. Indeed, DW1 informed the court that he does not know when the Defendants took possession of the land.
53. To the extent that the Defendant's evidence is that they have been in occupation of the land since 1959, and the plaintiffs having been unable to controvert that assertion, it is the holding of the court that the suit runs contrary to the provisions of section 7 of the Limitation of Actions Act which provides as follows;

“7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

54. In conclusion, this court dismisses the Plaintiff's suit and partially allows the Defendants' counterclaim as follows:
- a. A declaration be and is hereby issued that land parcel number Muguga/Muguga/T.69 is unregistered community land which was irregularly transferred from the Native Trust Board.
 - b. The Plaintiffs' suit is time barred.
 - c. The Land Registrar is hereby directed to cancel the registration of the land in the deceased Plaintiff's name on 24th June 1982 as entry No. 3 and the title to revert to the County Government of Kiambu.
 - d. That the Defendants' interests in the suit property to be considered by the National Land Commission and the Kiambu County Government as provided for under the Constitution and the Community Land Act and any other relevant laws.
 - e. The Plaintiffs shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF JANUARY, 2024.

O. A. Angote

Judge

In the presence of;

Mr. Thiga for Plaintiff

Ms Ngigi for 1st, 2nd, 3rd, 4th, 5th, 10th and 11th Defendants

Court Assistant - Tracy

